

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WALSH SECURITIES, INC.,	:	
	:	
Plaintiff,	:	Civil Action No. 97-3496
	:	(WGB)
v.	:	
	:	
CRISTO PROPERTY MANAGEMENT, LTD.,	:	<u>OPINION</u>
a/k/a G.J.L. LIMITED, DEK HOMES OF	:	
NEW JERSEY, INC., OAKWOOD	:	
PROPERTIES INC., NATIONAL HOME	:	
FUNDING, INC., CAPITAL ASSETS	:	
PROPERTY MANAGEMENT & INVESTMENT	:	
CO., INC., CAPITAL ASSETS	:	
PROPERTY MANAGEMENT, L.L.C.,	:	
WILLIAM J. KANE, GARY GRIESER,	:	
ROBERT SKOWRENSKI, II, RICHARD	:	
CALANNI, RICHARD DIBENEDETTO, JAMES:	:	
R. BROWN, THOMAS BRODO, RONALD J.	:	
PIERSON, STANLEY YACKER, ESQ.,	:	
MICHAEL ALFIERI, ESQ., RICHARD	:	
PEPSNY, ESQ., ANTHONY M. CICALEASE,	:	
ESQ., LAWRENCE M. CUZZI, ANTHONY	:	
D'APOLITO, DAP CONSULTING, INC.,	:	
COMMONWEALTH LAND TITLE INSURANCE	:	
COMPANY, NATIONS TITLE INSURANCE	:	
OF NEW YORK INC., FIDELITY NATIONAL	:	
TITLE INSURANCE COMPANY OF NEW	:	
YORK, COASTAL TITLE AGENCY, and	:	
STEWART TITLE GUARANTY COMPANY,	:	
IRENE DiFEO, DONNA PEPSNY,	:	
WEICHERT REALTORS, AND VECCHIO	:	
REALTY, INC. D/B/A MURPHY REALTY	:	
BETTER HOMES and GARDENS,	:	
	:	
Defendants.	:	
	:	

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Bassler, Senior District Judge

The defendants Stewart Title Guaranty Company ("Stewart Title") and Weichert Realtors ("Weichert") move to dismiss the complaint of Walsh Securities, Inc. ("Walsh Securities") on the ground that the applicable statute of limitations has run. The Court heard oral argument on January 12, 2006 regarding the dismissal of the complaint.

INTRODUCTION

Walsh Securities brought this action alleging that in early 1996 numerous co-conspirators engaged in racketeering activity inducing Walsh Securities to purchase about two hundred twenty mortgage loans at fraudulently inflated prices. For background see Walsh Sec., Inc. v. Christo Prop. Mgmt., 7 F. Supp. 2d 523 (D.N.J. 1998). Because of the fraud of individuals, including the collaboration of appraisers with inflated appraisals and fraudulent transmittal of deeds by closing attorneys to themselves and certain other defendants, when Walsh Securities, a wholesale mortgage banker, began to foreclose mortgages with delinquent loans, it was unable to recoup the full amounts of the outstanding mortgage loans.

There are thirty-four named defendants. Defendants Commonwealth Land Title Insurance Company ("Commonwealth Land Title"), Nations Title Insurance of New York, Inc. ("Nations Title"), Fidelity National Title Insurance Company ("Fidelity

National Title"), and Stewart Title collectively are referred to in the Third Amended Complaint as the "Title Insurance Defendants." (See 3d Amend. Compl. ¶¶ 33, 34).¹

JURISDICTION

With allegations that defendants other than Stewart Title and Weichert violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act, the Court has jurisdiction according to 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331.

BACKGROUND

Stewart Title issued title insurance and closing service protection letters on some properties financed by Walsh Securities to protect it from losses. In conjunction with real property transactions involving National Home Funding ("NHF") and Cristo Property Management, Inc. ("Cristo Property"), borrowers of mortgage loans from Walsh Securities obtained title insurance from the Title Insurance Defendants, including Stewart Title. In exchange, they provided Walsh Securities with closing service protection letters covering the conduct of the Closing Attorneys, who were specifically approved by the Title Insurance Defendants. (See 3d Amend. Compl. ¶ 94).

Walsh Securities brought this action in July 1997, alleging it suffered losses as a result of fraudulent real estate transactions perpetrated through racketeering activity which

¹References are to paragraphs in Walsh Securities, Inc. Third Amended Complaint

became the subject of a criminal investigation by the United States Attorney's Office. The investigation resulted in numerous convictions,² including that of a former Weichert employee, Donna Pepsny.

In its complaint and amended complaints, Walsh Securities alleges that it was induced to purchase these mortgage loans from NHF based on fraudulent misrepresentations contained in the mortgage loan applications, including appraisals of the properties at issue. (3d Amend. Compl. ¶ 38). The proceeds from Walsh Securities' mortgage loans would, among other things, be distributed among the RICO defendants as their illicit profits. (3d Amend. Compl. ¶ 38).

In a typical transaction, Walsh Securities alleges that defendant William Kane ("Kane"), through his company, Cristo Property, purchased a house in a low income neighborhood for a low price. (3d Amend. Compl. ¶ 64(a)). Cristo Property, or one or more of the other RICO defendants, including Donna Pepsny, acting as a Weichert real estate agent, then located a willing buyer. (3d Amend. Compl. ¶ 64(b)). The property was then appraised by licensed appraisers (hired by NHF and Cristo - Property) at an inflated value. (3d Amend. Compl. ¶¶ 64 (c)(d)).

²Reportedly there were twenty-one convictions, which included appraisers, lawyers, real estate investors and mortgage brokers. See Asbury Park Press (Jan. 10, 2006) reporting that Elizabeth Ann Demola, "a principal in the now-defunct Walsh Securities . . . is now awaiting sentencing for her role in the scheme . . ."

Thereafter, a mortgage loan application for the buyer was prepared by NHF or Cristo Property and submitted to Walsh Securities for financing. (3d Amend. Compl. ¶ 64(e)). The mortgage loan applications, in addition to inflated appraisals, contained false information: leases indicating that the property would be income-producing; statements that the buyer made a down payment; statements that the seller, Cristo Property, had provided a second mortgage on the property; and representations that the buyer would own the entire property. (3d Amend. Compl. ¶¶ 64(e)(1)-(8)). These false statements were designed to satisfy the loan underwriting criteria and thereby induce Walsh Securities into approving the loan. (3d Amend. Compl. ¶ 64(e)(8)).

On the day of the closing, the closing attorney would collect and transmit the proceeds of the mortgage loan, knowing that the preconditions to the loan had not been met and were false. (3d Amend. Compl. ¶ 64(g)). The closing attorney also would record the various deeds associated with the transactions. (3d Amend. Compl. ¶ 64(h)). Once the transaction was complete, however, the buyer would transfer sixty percent of the ownership in the property to defendant Capital Assets Property Management, L.L.C. ("Capital Assets") without notifying Walsh Securities. (3d Amend. Compl. ¶ 64(i)). This type of reconveyance is a default on the terms of Walsh Securities mortgage loans and Walsh

Securities would not have financed the mortgage loan had it known of the plan to reconvey the buyer's interest in the property. (3d Amend. Compl. ¶ 64(i)).

Capital Assets would then pool rental income from several properties to meet the mortgage obligations on the property. (3d Amend. Compl. ¶ 64(j)). However, given the nature of the fraud, Capital Assets would soon become delinquent in paying its mortgage obligation unless it continued to obtain mortgage loans to defraud Walsh Securities. (3d Amend. Compl. ¶ 64(m)).

With respect to these fraudulently obtained mortgage loans, the Title Insurance Defendants, including Stewart Title, issued to Walsh Securities, as the mortgage lender, closing service protection letters, which required the Title Insurance Defendants to reimburse Walsh Securities for losses arising out of the fraudulent actions of the title companies' approved Defendant closing attorneys. (3d Amend. Compl. ¶¶ 93, 94). Walsh Securities alleges that two of the closing attorneys, Stanley Yacker and Anthony Cicalese, were selected by Kane and NHF and specifically were approved to handle closings by the Title Insurance Defendants. (3d Amend. Compl. ¶ 22).

This same pattern of fraud, with slight variations, occurred over two hundred twenty times. (3d Amend. Compl. ¶ 66). Walsh Securities remains liable for a substantial portion of the value of these mortgage loans fraudulently obtained by the RICO

defendants. (3d Amend. Compl. ¶ 40). It will not be able to recover through foreclosures the full amounts that have been lent on the properties because of the fraudulently inflated appraisals of the real properties that secure the mortgage loans; many of the properties are not of value equal to or greater than the amount of the mortgage loans and the fraudulent sales contracts. (3d Amend. Compl. ¶ 40). In addition, it is alleged that this fraud perpetrated against Walsh Securities has injured the business reputation of Walsh Securities and caused Walsh Securities to lose a substantial amount of business and profits, including the cancellation of an impending sale of Walsh Securities to a third party. (3d Amend. Compl. ¶ 40).

On July 17, 1997, Walsh Securities filed its initial complaint in this action, followed by an amended complaint on November 7, 1997. On January 16, 1998, several defendants, who were targets of the criminal investigation by the United States Attorneys Office for the District of New Jersey ("U.S. Attorneys Office"), moved for a stay of the civil proceedings pending the outcome of the criminal investigation. These defendants argued that they could not fully participate in civil discovery and, at the same time, protect their Fifth Amendment rights.

The Court heard oral argument on the motion on March 30, 1998, entertained an *in camera* submission by the U.S. Attorneys Office, and entered an order on April 28, 1998, *inter alia*,

staying all interrogatory and deposition discovery in the action until November 1, 1998. The order did not stay the action nor did it preclude document discovery. (See Op. of the Ct. (Apr. 28, 1998)).

In early 1998, counsel for Walsh Securities was engaged in extensive and lengthy settlement negotiations with Stewart Title's counsel concerning Walsh Securities' claims for coverage under the closing service protection letters issued by Stewart Title. (See Decl. of Robert A. Magnanini ("Magnanini Decl.") ¶ 8 (June 3, 2005)). No agreement was signed tolling the statute of limitations and current counsel Magnanini states that negotiations "abruptly ended" after the April 28, 1998 order. (See Magnanini Dec. at ¶¶ 8,9).

Walsh Securities contends that despite several requests to the U.S. Attorneys Office and to the Court to lift the stay, the stay was extended by the Court because of the continuation of the criminal investigation. (See Magnanini Dec. ¶ 3). The docket reflects no application to the Court and the Court's file contains no indication of any request by Walsh Securities. In any event, the order only stayed interrogatory and deposition discovery, not the litigation itself; the case remained on the Court's active docket until May 30, 2000 when the Court, *sua sponte*, entered an order administratively terminating and removing the case from the active docket because of the ongoing

criminal investigation. The Court's Order of May 30, 2000 did not provide for tolling the statute of limitations. After being notified by the U.S. Attorney's Office that the criminal matter was ended, the Court entered an Order dated September 27, 2004 terminating the administrative stay and directing that the "litigation shall proceed forward immediately toward conclusion."

After a Case Management Conference before Judge Madeline Cox Arleo on December 20, 2004, Walsh Securities circulated a draft Third Amended Complaint. (See Magnanini Dec. ¶ 5.) Because none of the defendants objected to the filing of the Third Amended Complaint, the Court granted leave to file it, and it was filed on January 28, 2005. (See Magnanini Dec. ¶ 6).

ANALYSIS

Walsh Securities' claim against Stewart Title is grounded on its title insurance policies and the multiple closing service protection letters. The claim against Weichert is grounded on vicarious liability for the fraud of its employee, Donna Pepsny.

STEWART TITLE'S MOTION TO DISMISS

Stewart Title moves to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) because it is barred by the applicable statute of limitations: N.J. Stat. Ann. § 2A:14-1.³ This statute, which bars fraud and breach of contract actions instituted six years after the cause has accrued, applies to insurance actions. (See

³ The parties agree that the New Jersey law governs the common law actions.

Gahnney v. State Farm Ins. Co., 56 F. Supp. 2d 491 (D.N.J. 1999).

No one disputes that the motion to dismiss on grounds that the statute of limitations has run, as it has here, is procedurally proper. See Robinson v. Johnson, 313 F.3d 128, 125 (3d Cir. 2002), *cert. denied*, 540 U.S. 826 (2003).

Walsh Securities' Third Amended Complaint, with claims for the first time against Stewart Title, was not filed until January 28, 2005, beyond the time permitted by the statute of limitations. Because the claims against Stewart Title were not filed within the statutory period, they must be dismissed unless saved by equitable estoppel or the provisions of Fed. R. Civ. P. 15(c))that provide for relation back to the date of the original complaint.

The response of Walsh Securities to the defense of the running of the statute of limitations is, essentially, that it is unfair because Stewart Title and Weichert knew about the fraudulent scheme of the RICO defendants and their potential liability, and they are no worse off now than if the complaint had been filed earlier.

Of course, that is not a winnable argument, for it would eviscerate the legislative determination underpinning all statutes of limitations that they are statutes of repose and, while the time periods are arbitrary, absent exceptions, defendants are entitled to rely on them. The Court is aware that

often claims by the parties cannot be wholly reconciled and, as Justice Mountain observed in addressing the role of the discovery rule, the "equitable claims of opposing parties must be identified, evaluated and weighed." See Lopez v. Swyer, 62 N.J. 267 (1973). Other jurisdictions (no New Jersey case could be found) provide, "[w]henever suit is filed after the limitations period, as it had been in this case, the burden is on the plaintiff to establish that the statute has been tolled." Swietlowich v. County of Bucks, 610 F.2d 1157, 1162 (3d Cir. 1979). See also Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 487 (3d Cir. 1985); Courtney v. La Salle U., 124 F.3d 499, 505 (3d Cir. 1997).

With these guideposts in mind, the Court turns to the question of whether equitable tolling can save Walsh Securities from the bar of the statute of limitations.

EQUITABLE TOLLING

Walsh Securities can be saved from the statutory bar if the statute of limitations tolled during the four year period from the time of the Court's administrative dismissal on May 30, 2000 until the case was reactivated on September 30, 2004.

Walsh Securities recognizes that it had until the end of June 2003 to file breach of contract claims, but argues that, because of this Court's initial stay, extension of the stay, and administrative dismissal of the case, it has been unable to

proceed with this action. Walsh Securities further argues that, even if the discovery stay did not toll the statute of limitations, the May 2000 administrative dismissal did. Therefore, it "still had . . . [t]hree years and one month to file breach of contract . . . claims." (See Walsh Securities' Consol. Memo. of Law in Op. to D.s' Mot. to Dismiss p. 10).

In response, Stewart Title points out that where New Jersey recognizes the doctrine of equitable tolling it often involves situations where a plaintiff has been induced or tricked by a defendant into missing a deadline. See Villalobos v. Fava, 342 N.J. Super. 38, 50 (App. Div.), *cert. denied*, 170 N.J. 210 (2001); Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 276-278 (App. Div.) *cert. denied*, 153 N.J. 402 (1998); see also generally Pressler, Current N.J. Court Rules, (Gann 2005) Comment 36.4.1 on R. 4:5-4 at 1161-1162. New Jersey also recognizes the doctrine of equitable tolling in situations where the claim is based on the commencement of other cognate litigation. See Galligan v. Westfield Centre Service, Inc., 82 N.J. 188 (1980); see also generally Pressler, Current N.J. Court Rules, (Gann 2005) Comment 36.4.2.b. on R. 4:5-4 at 1162-1163.

The Court accepts the parties' assumption that state law provides the governing rule, but notes that, in the Seventh Circuit at least, a plaintiff can invoke any federal or state

tolling provision to save its claims. See White v. Williams, No. 94-C-3836, 1997 WL 261357, at *2 (N.D. Ill. May 8, 1997). New Jersey cases, however, do not provide any guidance on the real question here: should the statute of limitations be tolled when a case is administratively terminated. Administrative termination is a procedural device that allows a district court judge to get an inactive case (for example, a case stalled by bankruptcy) off the list of pending cases. As explained by the Eighth Circuit, an administrative dismissal is issued in situations where the court has done everything it can to get a case off its "plate." See Behrle v. Olshanski, 966 F.2d 1458, 1459 (8th Cir. 1992). "[S]uch orders are sometimes entered by courts . . . for statistical purposes." Id. The case then can be reactivated when the court is notified, as here, that there is no longer a reason for the stay.

The federal doctrine of equitable tolling has been articulated by the Third Circuit in Podobnik v. U.S. Postal Serv., 409 F.3d 584 (2005). There are three principal situations in which equitable tolling is appropriate: (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action and that deception causes non-compliance with an applicable limitations provision; (2) where the plaintiff in some extraordinary way has been prevented from

asserting his rights; or, (3) where the plaintiff has timely asserted his rights mistakenly in the wrong forum.

The circumstances here do not justify equitable tolling. Walsh Securities had in its possession from the very beginning the title insurance policies and the attorney closing service protection letters from Stewart Title. No discovery was needed to identify Stewart Title as a potential responsible party. Further, Walsh Securities knew, within the limitations period, of the facts forming the basis of its claims against the insurance companies, including Stewart Title. That knowledge, and the delay of eight years before suing Stewart Title, undercuts its appeal to equity.

Walsh Securities failed to name Stewart Title in its original complaint and in its Amended Complaint filed November 7, 1997. Nor did Walsh Securities move against Stewart Title before the administrative dismissal. Nothing prevented Walsh Securities from moving to return the case to the active docket for the limited purpose of asserting a claim against a non-party in order to prevent the statute from running. In fact, it did not file the Third Amended Complaint until four months after the administrative dismissal was vacated.

A plaintiff is not entitled to equitable tolling where the plaintiff has not been diligent. See White, 1997 WL 261357 at

*2. A stay of discovery does not automatically toll the statute of limitations. The Court does not see why an administrative dismissal should. Tolling would be appropriate if Walsh Securities did not know of the existence of its claim against Stewart Title. See Id. at *3 (statute of limitations was not tolled during stay because plaintiff had knowledge of defendant's identity such that it could have moved to amend its complaint). Walsh Securities knew or should have known of the mortgages insured by its own title company. Certainly it knew in early 1998 since it was engaged in settlement discussions with Stewart Title. Even after settlement discussions apparently fell apart, Walsh Securities did not pursue a cause of action against Stewart Title.

The administrative dismissal had no more bite than a stay. It is the functional equivalent of a stay. The purpose of the stay was to protect the privilege of the criminal defendants against self incrimination. Walsh Securities could have applied to the Court at any time to lift the stay in order to amend the complaint to include Stewart Title. In fact, in issuing its opinion regarding the Stay of Discovery, the Court specifically addressed the fact that the Stay of Discovery was not indefinite and invited "the parties [to] petition the Court to lift or modify the stay if there was a change warranting it." See 7 F.

Supp 2d at 529. That is exactly what defendant Michael Alfieri did by filing a motion to lift the stay. On another occasion, the Court permitted a defendant who had filed an answer to assert a cross claim. Again, on another occasion, the Court permitted the law firm representing Walsh Securities to submit a letter in which it sought to withdraw as counsel.

Walsh Securities says it could not file a complaint against Stewart Title in the state court because it was prevented from doing so by New Jersey's entire controversy doctrine. However, the entire controversy doctrine did not stand in the way of Walsh Securities bringing an action in the state court on its independent claim for breach of contract. Stewart Title was not a part of the RICO conspiracy or a joint insurer with the other Title Insurance Defendants. New Jersey's entire controversy doctrine would not have required dismissal when multiple actions involving the same or related claims were pending. See Kaselaan & D'Angelo Assoc., Inc. v. Soffian, 290 N.J. Super. 293, (App. Div. 1996).

Moreover, New Jersey Court Rule 4:30A, institutionalizing the entire controversy doctrine, was amended in September 1998 to permit non-joinder of claims. See Rycoline Prods., Inc. v. C & W Unltd. 109 F.3d 883, 888-889 (3d Cir. 1997). Walsh Securities could have, but did not, avail itself of this rule.

Moreover, there is no evidence to support Walsh Securities' argument that, by engaging in claim settlement negotiations with Stewart Title, it was lulled into a false sense of security by Stewart Title, which then sprung the statute of limitations. But settlement negotiations alone do not constitute the wrongful conduct necessary for estoppel. See Price v. N. J. Mfrs. Ins. Co., 182 N.J. 519 (2005). Certainly when, as Walsh Securities contends, Stewart Title "abruptly ended" the settlement discussions in April 1998, it was then apparent, if not before, that Stewart Title was not going to pay the claim.

Contrary to Walsh Securities appeal to equity, New Jersey law is not so forgiving about non-compliance with the statute of limitations. See Nativio v. Grand Union Co., 315 N.J. Super. 185 (App. Div. 1998).

Under these circumstances, Walsh is not entitled to equitable tolling. When it comes to seeking relief from statutes of limitations, victory goes to the diligent, not the dilatory.

RELATION BACK

In reliance on Fed. R. Civ. P. 15(c), Walsh Securities also argues that the claims against Stewart Title are not barred because they relate back to the original complaint.

Fed. R. Civ. P. 15(c) provides that an amended complaint relates back to the date of the original pleading when: (1)

relation back is permitted by the applicable statute of limitations; or, (2) the claim asserted in the amended complaint "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;" or, (3) the amendment changes the party or the name of the charged party. If (2), above, is satisfied within the time provided by Fed. R. Civ. P. 4(m), and the new party has received sufficient notice so as not to be prejudiced in defending on the merits and knew or should have known that "but for the mistake concerning the identity of the proper party, the action would have been brought against the party." (Emphasis added).

In Bryan v. Assoc. Container Transp., 837 F. Supp. 633 (D.N.J. 1993), Judge Simandle carefully analyzed how the relation back doctrine should be analyzed under federal law and under state law. In a nutshell, where the state law provides the statute of limitations, and state law permits a more forgiving principle of relation back than the one provided by Fed. R. Civ. P. 15(c), then the state law applies. Fed. R. Civ. P. 15(c)(1) would permit Walsh Securities to look to New Jersey state law to determine whether New Jersey state law would permit the statute of limitations to be extended. N.J. R. Civ. P. 4:9-3 governs when amendments relate back.

Neither party, though, has argued that the New Jersey rule

is more liberal, and the Court, therefore, assumes that it is not. Moreover, even a cursory reading of the rule supports the conclusion that it is not more liberal than the federal rule. Under the New Jersey rule, the claim against a new party must arise out of the original "conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading," and, in addition to the new party not being prejudiced, the new party must have known, or should have known, that "but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by the amendment." (N.J. R. Civ. P. 4:9-3). (Emphasis added). Cf. Notte v. Merch. Mut. Ins. Co., --- A.2d ----, 2006 WL 59594 (N.J.) (when a period of limitation has expired, a distinctly new or different claim or defense is barred).

As Stewart Title has observed, "noticeably absent from Walsh Securities' submission is any allegation that Walsh Securities was mistaken as to Stewart's identity."

There are circumstances that would allow a claim barred by the statute of limitations to be saved by equitable tolling or by relation back under Fed. R. Civ. P. 15(c). Those circumstances are not present here.

WEICHERT'S MOTION TO DISMISS

Walsh Securities sues Weichert under the theory of

respondeat superior seeking to hold Weichert liable for the tort of the fraud (RICO and common law) committed by Weichert's employee, Donna Pepsny, who, after trial, was found guilty and is now serving her sentence in a federal prison.

The statute of limitations for RICO claims is four years and for common law fraud and for breach of contract claims is six years. See N.J. Stat. Ann. § 2A:14-1. See also S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 425 (3d Cir. 1999).

Although another realtor, Roland Peirson, and Donna Pepsny's husband, Richard Pepsny, were named in the original complaint, neither Donna Pepsny, nor her employer, Weichert, were named until the Third Amended Complaint. Walsh Securities has given no explanation for absenting them from their earlier complaints. The involvement of the realtors in the fraudulent scheme was not a secret. There was extensive newspaper coverage in June 1997. (See Cert. of John B. McCusker, ("McCusker Cert.") Ex. A, May 10, 2005). Surely, Walsh Securities knew of her participation in the scheme when she was indicted along with Stanley Yacker and Irene DiFeo on January 26, 2001. (See McClusker Cert., Ex. F). Walsh Securities does not dispute the statement in Weichert's brief that Donna Pepsny was convicted in June 2002. (See Weichert's Br. in Support of Mot. to Dismiss p. 6).

The question of exactly when Walsh Securities knew or should have known of Donna's Pepsny's involvement in the scheme need not detain us; counsel candidly acknowledged at oral argument that Walsh Securities knew of her involvement as early as July 1997.

Walsh Securities acknowledges in its brief at page 10 that it would have had until the end of June 2003 to file its fraud claims. Because it filed its Third Amended Complaint against Weichert Realty on January 28, 2005, it is barred by the statute of limitations unless Walsh Securities can benefit from equitable tolling or relation back under Fed. R. Civ. P. 15(c).

Just as Walsh Securities could not benefit from these doctrines to save its claim for breach of contract against Stewart Title, neither can Walsh Securities save its claim against Weichert for the fraud of its employee, Donna Pepsny.

The original stay of deposition and interrogatory discovery did not the stay the action. The administrative dismissal did not prevent Walsh Securities from asking the Court to reinstate the case, so that the complaint could be amended to include Weichert in order to stop the running of the statute of limitations. The administrative dismissal did not involve Weichert, so nothing prevented Walsh Securities from filing a complaint in the state court. As we have previously seen, the New Jersey entire controversy doctrine was not an impediment.

There was ample opportunity within the statute of limitations to amend the complaint. When that is the case, as here, the statute of limitations works to prejudice a party who amends after the statute of limitations has run. For cases denying leave to amend a complaint where there has been undue delay, see Cureton v. Natl. Collegiate Athletic Assoc., 252 F.3d 267, 273 (3d Cir. 2001); J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 613 (3d Cir. 1987); USX Corp. v. Barnhart, 395 F.3d 161, 168 (3d Cir. 2004); Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993).

There is no legal or equitable ground to permit Walsh Securities in the face of a six year statute of limitations to now sue Weichert in 2005 for liability under respondeat superior for acts of an employee committed in 1996.

CONCLUSION

For the foregoing reasons "Count V, Breach of Contract by the Title Insurance Defendants," asserting a claim against Stewart Title and "Count VII, Respondeat Superior - Weichert," asserting a claim against Weichert is dismissed with prejudice.

An appropriate order follows.

January 20, 2006

/s/ William G. Bassler
William G. Bassler, U.S.S.D.J.